

IN THE
SUPREME COURT OF THE UNITED STATES
____ TERM, 1976

Supreme Court, U. S.
FILED

SEP 7 1976

MICHAEL ROBAK, JR., CLERK

No. 76-347

ROBERT H. PATTON,

Petitioner

VS.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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INDEX

	<u>Page</u>
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provision Involved ...	2
Statement of Facts	3
Reasons For Granting the Writ	4
Conclusion	9
Appendix A (Opinion of Court of Appeals)	10
Certificate of Service	21

CITATIONS

Page

Cases:

<u>Thompson v. City of Louisville,</u> 362 U.S. 199	4, 8
--	------

Statutes:

28 U.S.C. Sec. 1254 (1)	2
18 U.S.C. Sec. 658	2, 3

Constitutional Provisions:

Fifth Amendment, Constitution of United States	2, 4
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The Petitioner, ROBERT H. PATTON, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered in this proceeding on June 28, 1976.

OPINIONS BELOW

There was no formal opinion of the District Court. The opinion of the Court of Appeals has not yet been reported. It is reproduced in Appendix A to this Petition.

JURISDICTION

The judgment of the Court below (Appendix A, infra, P. 20) was entered on June 28, 1976. A timely petition for rehearing was denied on August 10, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

Was the submission of the Government's case against Petitioner to the jury by the Judge presiding in the lower court, with reservation of ruling on motion for judgment of acquittal, a denial of due process to Petitioner within the meaning of the Fifth Amendment of the United States Constitution, when the evidence presented by the Government failed to establish beyond a reasonable doubt all of the elements of the crime for which Petitioner was charged? (18 USC Sec. 658)

CONSTITUTIONAL PROVISION INVOLVED

Constitution of the United States, Amendment V:

"No person shall . . . be deprived of

life, liberty, or property, without due process of law . . ."

STATEMENT OF FACTS

The petitioner, Robert H. Patton, was indicted on charges that he knowingly removed and concealed, with intent to defraud, 138 head of cattle pledged as security for a loan obtained from the Dunn Production Credit Association in violation of the provisions of 18 U.S.C. Section 658. Petitioner was convicted by a jury as charged in the indictment and said conviction was affirmed by the United States Court of Appeals for the Fourth Circuit No. 75-2314.

At the close of the Government's case in chief, Petitioner, moved for judgment of acquittal on the ground that the prosecution had failed to establish the elements of the crime as alleged in the indictment. After argument by counsel the judge reserved his ruling on the motion. Petitioner presented no evidence and the case was permitted to go to the jury. The jury returned a guilty

verdict, and after additional argument on Petitioner's motion for judgment of acquittal, the Court denied the motion, thereby allowing the jury verdict to stand. Petitioner was sentenced to imprisonment for a term of three years, which was suspended, placed on probation for three years, and fined \$3,000.00.

REASONS FOR GRANTING THE WRIT

The decision below affirms a criminal conviction based upon no evidence of guilt in direct conflict with the Court's decision in Thompson v. City of Louisville, 362 U.S. 199 and therefore denies Petitioner due process of law within the meaning of the Fifth Amendment of the United States Constitution.

The record simply shows that on November 1, 1972, Petitioner leased a cattle ranch near Lillington, North Carolina, for a term of one year, and that he subsequently obtained two loans of \$56,000.00 each and a third loan of \$27,000.00 from the Dunn Pro-

duction Credit Association. The \$56,000.00 loans, secured by 201 head of identified cattle, were due on October 15, 1973, and the \$27,000.00 loan was due on September 1, 1973. On November 5, 1973 Petitioner wrote the Dunn Production Credit Association proposing to repay the \$27,000.00 loan in full but requesting that the two \$56,000.00 loans be extended until May 1, 1974. In the same letter Petitioner expressed that his situation in North Carolina was becoming desperate and what he was going to try to do to save and preserve the secured cattle, to-wit: "As you know, the drought of the past couple of months has been quite severe. Due to lack of pasture and adequate winter feed, I need to move quite a number of cattle over to Mr. Bell, who does have adequate pasture and winter feed, as soon as possible." Thereafter, the \$27,000.00 loan was repaid and a renewal note was signed consolidating the two

\$56,000.00 loans for payment on or before May 1, 1974. However, during the months from November, 1973 to April and May of 1974, Petitioner's situation became even more critical as the property in Lillington, North Carolina which Petitioner had leased from November of 1972 to November of 1973 and on which Petitioner had located his cattle was sold. Then in early May of 1974, the Petitioner's cowboys were served with attachment in an unrelated civil action by a local deputy sheriff who advised that the Sheriff's Department was going to see that the cattle were taken care of. However, during the next three weeks the deputy did not go out and feed the cattle nor did anyone from the Sheriff's Department take measures to see that the cattle were properly fed and cared for. Thus, during this period of time there were no cowboys and no one attending the cattle and the cattle had no water or food for several weeks. At this

most critical period of time when the secured cattle were starving and left unattended by the Sheriff's Department, the President of the Dunn Production Credit Association was out of the country as Petitioner had been advised by an inferior employee of the Dunn Production Credit Association which the evidence disclosed had no authority to either authorize or object to any movement and could not be consulted about any move of the cattle. Hence, Petitioner, faced with this desperate situation, and knowing that the President of the Dunn Production Credit Association was out of the country and that no one else could give him authority to move the cattle or object to same, acted in the only manner he could to save the cattle from starvation and to preserve their value as security for the loans with the Dunn Production Credit Association. The Government's evidence simply showed that in May of 1974 the Petitioner had not paid off his indebted-

ness to the Dunn Production Credit Association and had removed the secured cattle to Kentucky. There was absolutely nothing in the record to support the conclusion that the Petitioner did anything "with intent to defraud the Dunn Production Credit Association", an essential element of the crime for which Petitioner was charged.

Thus this case is like Thompson v. City of Louisville, 362 U.S. 199, and should have been decided on the same principles applied in that case.

The judgment below conflicts sharply with the law as this Court declared it in the Thompson case and denies Petitioner due process of law under the Fifth Amendment of the United States Constitution. A full hearing, therefore, should be granted so that this Court may consider the grave constitutional issue posed by this contradiction.

CONCLUSION

For the foregoing reasons, this Petition
For Writ of Certiorari should be granted.

Respectfully submitted,

ANDERSON, BROADFOOT & ANDERSON

BY: Henry L. Anderson, Jr.
Henry L. Anderson, Jr.

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Counsel For Petitioner

APPENDIX A

OPINION OF COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 75-2314

UNITED STATES OF AMERICA,

Appellee,

vs.

ROBERT H. PATTON,

Appellant

Appeal from the United States District Court
For the Eastern District of North Carolina,
at Raleigh. Franklin T. Dupree, Jr.,
District Judge.

Argued April 8, 1976. Decided June 28, 1976

Before BOREMAN, Senior Circuit Judge, CRAVEN,
Circuit Judge, and HADEN, District Judge *

Henry L. Anderson, Jr. (Anderson, Broadfoot
& Anderson, on brief) for Appellant; James
T. Stroud, Jr., Asst. United States Atty.
(Thomas P. McNamara, United States Attorney
on brief) for Appellee.

* Sitting by designation.

BOREMAN, Senior Circuit Judge:

The appellant, Robert H. Patton, was indicted on charges that he knowingly removed and concealed, with intent to defraud, 138 head of cattle pledged as security for a loan obtained from the Dunn Production Credit Association (hereinafter the credit association) in violation of the provisions of 18 U.S. Section 658.¹ Patton was convicted by a jury as charged in the indictment. On appeal he contends (1) that the district court erred by denying his motion for judgment of acquittal, and (2) that

1. 18 U.S.C. Section 658 provides, in pertinent part:

Whoever, with intent to defraud, knowingly conceals, removes, disposes of, or converts to his own use or to that of another, any property mortgaged or pledged to, or held by ... any production credit association organized under sections 1131-1134m of Title 12 ... shall be fined not more than \$5,000 or imprisoned not more than five years, or both; but if the value of such property does not exceed \$100, he shall be fined not more than \$1,000 or imprisoned not more than one year, or both.

- 11 -

reversible error occurred when the court allowed the government to reopen its case after it had rested. We affirm.

At the close of the government's case in chief Patton moved for judgment of acquittal on the ground that the prosecution had failed to establish the elements of the crime as alleged in the indictment. After argument by counsel the judge reserved his ruling on the motion.² Patton presented

2. Rule 29 of the Federal Rules of Criminal Procedure governs motions for judgment of acquittal. Although Rule 29(b) expressly provides for reserving ruling on a motion for acquittal at the close of all the evidence, there is no specific provision permitting the trial court to reserve its ruling when the motion is made, as permitted by Rule 29(a), at the close of the government's case. As a result, the rule has generally been interpreted as requiring that a ruling is mandatory when the motion is made at the close of the government's evidence. *United States v. Brown*, 456 F. 2d 293 (2 Cir. 1972); *United States v. Prionas*, 438 F.2d 1049 (8 Cir.), cert.denied, 402 U.S. 977 (1971); *United States v. Godel*, 361 F.2d 21 (4 Cir. 1966); *Weathers v. United States*, 322 F.2d 566 (9 Cir. 1963); *Jackson v. United States*, 250 F.2d 897 (5 Cir. 1958); C. Wright, *Federal Practice and Procedure: Criminal Sec. 462* (1969). How-

(Footnote 2 continued on page 13)

no evidence and the case was permitted to go to the jury. The jury returned a guilty verdict, and after additional argument on Patton's motion for judgment of acquittal, the court denied the motion, thereby allowing the jury verdict to stand. Patton was sentenced to imprisonment for a term of three years, which was suspended, and fined \$3,000.00.

(Footnote 2 continued from page 12)

ever, if a ruling on the defendant's motion is erroneously reserved by the district court, the error is not considered prejudicial, but is considered harmless, if the government's evidence at the time the motion for acquittal is made is sufficient to present a jury question as to the defendant's guilt. United States v. Godel, 361 F.2d 21, 23 (4 Cir. 1966); see United States v. Prionas, *supra*; Cooper v. United States, 321 F.2d 274 (5 Cir. 1963). In the instant case, all the evidence considered by the court in denying the motion for judgment of acquittal was presented prior to the motion. Since we determine, *infra*, that this evidence was sufficient not only to present a jury question but also to permit the jury to find Patton guilty beyond a reasonable doubt, it is clear that the district court's reservation of its ruling was harmless error.

Upon a motion for judgment of acquittal "the test is whether there is substantial evidence which, when viewed in the light most favorable to the government, tends to show that the defendant is guilty beyond a reasonable doubt; and the rule is the same whether the evidence is direct or circumstantial." Johnson vs. United States, 265 F.2d 496 (4 Cir. 1959); accord, United States v. Harris, 409 F.2d 77 (4 Cir. 1969); United States v. Veal, 402 F.2d 793 (4 Cir. 1968); Bell v. United States, 185 F.2d 302 (4 Cir.), cert. denied, 340 U.S. 930 (1951).³

In the instant case, the only evidence before the district court when it denied the

3. The opinions in both Johnson and Bell refer to the motion as a "motion for a directed verdict." Rule 29(a) abolishes motions for directed verdicts, substituting therefor motions for judgment of acquittal. This change, however, is purely one of nomenclature, and the change in name does not make any change in the substance of the motion.

motion was that presented by the prosecution prior to the motion. The evidence largely circumstantial, indicated that on November 1, 1972, Patton leased a cattle ranch near Lillington, North Carolina, for a term of one year, and that he subsequently obtained two loans of \$56,000 each and a third loan of \$27,000 from the credit association. The \$56,000 loans, secured by 201 head of identified cattle, were due on October 15, 1973, and the \$27,000 loan was due on September 1, 1973. In November 1973, after all these loans were past due, Patton wrote the credit association proposing to repay the \$27,000 loan in full but requesting that the two \$56,000 loans be extended until May 1, 1974. He further requested that he be given permission to move 62 head of secured cattle from his ranch in North Carolina to a farm in Kentucky owned by one Ed Bell and asked that Bell be accepted as guarantor of 50% of the amount of the renewal. Patton stated in his letter that there was a lack of pasture

and winter feed at the North Carolina ranch and he felt there was a need to move "quite a number of cattle" to Kentucky. The evidence further indicated that pursuant to these proposals the \$27,000 loan was repaid, a renewal note was signed consolidating the two \$56,000 loans for payment on or before May 1, 1974, and in December 1973 Patton caused several truckloads of cattle to be moved to Kentucky.

There was additional evidence, however, which indicated that on April 28, 1974, without notifying the credit association Patton began to ship large numbers of cattle to Kentucky. Although a local sheriff served notice on Patton's employees on May 2, 1974, that the remaining cattle were to be subjected to attachment as the result of an apparently unrelated dispute, Patton continued to remove cattle from the North Carolina ranch until May 27, 1974, when the last of the cattle were removed. The only contact

between Patton and the credit association during this period was an oral request made by Patton in May 1974 that he be permitted to remove to another county in North Carolina the cattle which were designated as security for his borrowings. The credit association did not grant the request and the evidence indicated that Patton made no further attempts to contact the credit association and did not repay any part of the consolidated \$56,000 loans.

Patton argues that the evidence was insufficient to show an intent to defraud. We find, however, that it was uncontroverted that Patton not only failed to repay the loans secured by the cattle, but also removed the cattle without giving any notice to the credit association that he was doing so. Although Patton now argues that his November 1973 letter could be construed to indicate an intention on his part that all the pledged cattle would eventually be moved to Kentucky,

there was no offer of evidence at trial to support such an interpretation. To the contrary, the evidence showed that the only contact Patton had with the credit association, either at the time the cattle were moved or thereafter, indicated that the cattle would be moved to another county in North Carolina, not across state lines into Kentucky. The jury clearly could infer from such a communication that Patton's conduct was calculated to mislead and deceive his creditor. Under these circumstances, we hold that the evidence introduced by the prosecution was sufficient to sustain a prima facie case of intent to defraud and, since the evidence was unrebutted, it was sufficient to permit the jury to find Patton guilty beyond a reasonable doubt. Accordingly, we sustain the district court's denial of the motion for judgment of acquittal.

Patton also argues that reversible error occurred when the district court permitted the government to reopen its case after

resting. The record discloses that at the close of the government's case, Patton's attorney requested to be heard. The court excused the jury and immediately thereafter the prosecution moved to have ten exhibits, previously referred to and identified by the witnesses, admitted into evidence. The government's motion was granted and Patton thereafter moved for judgment of acquittal.

Decision on a motion of the government for permission to reopen its case is left to the sound discretion of the court. United States v. Webb, 398 F2d 553 (4 Cir. 1968); Gormley v. United States, 167 F.2d 454 (4 Cir. 1948). Patton has failed to demonstrate how or in what manner the granting of the motion by the prosecution to reopen, made immediately after it had rested, prior to any defense motions or presentation of evidence on behalf of the defendant, and which merely sought the formal admission into evidence of documents previously re-

ferred to by witnesses, was prejudicial to his defense. We find no abuse of discretion in permitting the government to reopen under these circumstances.

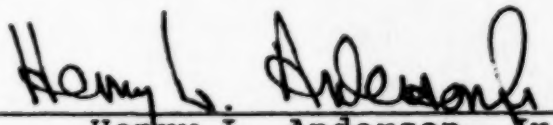
The judgment of the district court will be affirmed.

Affirmed.

CERTIFICATE OF SERVICE

I, Henry L. Anderson, Jr., attorney for
Petitioner in United States of America vs.
Robert H. Patton, do hereby certify that I
have this date caused to be forwarded three
copies of Petition For Writ of Certiorari
for Petitioner, Robert H. Patton, via United
States Mail, postage prepaid, to Hon. Robert
Bork, Solicitor General, Department of Justice,
Constitution Avenue & 10th St., N.W., Wash-
ington, D. C. 20530.

This *3rd* day of September, 1976.



Henry L. Anderson, Jr.

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Counsel for Petitioner

No. 76-347

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

ROBERT H. PATTON, PETITIONER

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT**

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

**ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.**

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-347

ROBERT H. PATTON, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT*

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that his conviction is void for lack of evidence of fraudulent intent.

Following a jury trial in the United States District Court for the Eastern District of North Carolina, petitioner was convicted of fraudulently concealing or removing property pledged to a production credit association, in violation of 18 U.S.C. 658. He was sentenced to three years' imprisonment and fined \$3,000. Execution of the sentence was suspended, and petitioner was placed on probation for three years. The court of appeals affirmed in a thorough opinion on which we rely (Pet. App.).

Relying upon *Thompson v. City of Louisville*, 362 U.S. 199, 204, petitioner contends (Pet. 4-8) that the record in this case is so "entirely lacking in evidence to support" a finding of fraudulent intent that his conviction violated due process of law.

The government's proof at trial is recounted in detail in the opinion of the court of appeals (Pet. App. 15-17), and we see no purpose to be served in repeating it. Viewed in the light most favorable to the government (*Glasser v. United States*, 315 U.S. 60, 80), this evidence was clearly sufficient to support the jury's finding that petitioner removed and concealed 138 head of cattle with intent to defraud the Dunn Production Credit Association, which held a security interest in the livestock. As the court of appeals observed (Pet. App 17-18):

[Petitioner] argues that the evidence was insufficient to show an intent to defraud. We find, however, that it was uncontroverted that [petitioner] not only failed to repay the loans secured by the cattle, but also removed the cattle without giving any notice to the credit association that he was doing so. Although [petitioner] now argues that his November 1973 letter could be construed to indicate an intention on his part that all the pledged cattle would eventually be moved to Kentucky, there was no offer of evidence at trial to support such an interpretation. To the contrary, the evidence showed that the only contact [petitioner] had with the credit association, either at the time the cattle were moved or thereafter, indicated that the cattle would be moved to another county in North Carolina, not across state lines into Kentucky. The jury clearly could infer from such a communication that [petitioner's] conduct was calculated to mislead and deceive his creditor. Under these circumstances, we hold that the evidence introduced by the prosecution was sufficient to sustain a *prima facie* case of intent to defraud and, since the evidence was unrebutted, it was sufficient to permit the jury to find [petitioner] guilty beyond a reasonable doubt.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1976.